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OCTOBER TERM, 1961

No. [redacted] 149

SUN OIL COMPANY, *Petitioner,*

v.

THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Sun Oil Company, an intervenor in the Court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in Cause No. 18112 on February 22, 1961. The judgment set aside an order of the Federal Power Commission issued August 10, 1959, granting Petitioner a certificate of public convenience and necessity.

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals are not yet reported and are printed in Appendix A, *infra*, pp. 1a-29a. The order of the Federal Power Commission granting Petitioner a certifi-

cate of public convenience and necessity (R. 252-256) is reported at 22 F.P.C. 351-354 and its order denying rehearing (R. 287-288) is reported at 22 F.P.C. 654-655.[1]

JURISDICTION

The judgment of the Court of Appeals was entered February 22, 1961 (Appendix A, *infra*, p. 30a). Rehearing was denied April 6, 1961 (Appendix A, *infra*, p. 31a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether this Court's decision in *Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378 (*"Catco"*) requires, as apparently held by the Court below, that an applicant for a certificate of public convenience and necessity to sell natural gas must show that the proposed initial price is related to a just and reasonable price.

2. Whether this Court's *Catco* decision requires, as apparently held by the Court below, (1) that non-current prices must be considered in determining whether the initial price proposed in a certificate proceeding is "in line" under the criterion of that decision of this Court; and (2) that the Commission in determining whether an initial price proposed in a certificate proceeding is "in line" may not consider prices accepted by it in other matters no longer subject to judicial review, because similar prices in the area are involved in other proceedings still subject to review.

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[1] Record references are to the Joint Appendix filed with the Court of Appeals.

3. Whether this Court's *Cities* decision permits the Court below to set aside an initial certificate without price condition when the decision of that Court is predicated upon that Court's apparent re-evaluation of only a part of the evidence of record.

STATUTES INVOLVED

This case involves Section 7 and Section 19(b) of the Natural Gas Act, as amended (15 U.S.C. § 717f, § 717r (b)), pertinent provisions of which are printed in Appendix B, *infra*, pp. 34a-38a.

STATEMENT OF THE CASE

On May 19, 1958, Petitioner filed with the Federal Power Commission ("Commission") in Docket No. G-15122 an application for a disclaimer of jurisdiction or, in the alternative, an application for a certificate of public convenience and necessity with respect to the sale of natural gas to United Gas Pipe Line Company ("United") from the Belle Isle Field, St. Mary Parish, Louisiana (R. 171-177, 184). On the same date, Petitioner filed with the Commission as its rate schedule applicable to such proposed sale, the gas purchase contract between Petitioner and United dated May 1, 1958 (R. 103-150).

On May 19, 1958, United filed with the Commission in Docket No. G-15123 an application for a certificate of public convenience and necessity authorizing the construction and operation of approximately 9.35 miles of 16-inch lateral supply line and appurtenances to purchase and receive the natural gas from Petitioner pursuant to the contract of May 1, 1958 (R. 17, 19, 183).

By a notice issued on November 26, 1958, the aforementioned applications of Petitioner and United were consolidated for hearing (R. 183-184, 216). The United Gas Improvement Company ("UGI") and the Public Service Commission of the State of New York ("PSC-NY") were permitted to intervene, over the objections of the Petitioner, by an order of the Commission issued January 5, 1959 (R. 186-190, 192, 194-196, 199-201, 212). As provided in the Commission's notice dated November 26, 1958, a hearing was convened on December 30, 1958, but on account of the petition to intervene by UGI and the notice of intervention by PSC-NY, the hearing was recessed to January 27, 1959, on which date a formal hearing was held and concluded (R. 1-2, 6, 216).

On March 3, 1959, the Presiding Examiner issued his decision and order granting the certificates prayed for by Petitioner and United without price condition (R. 215-224). Exceptions to the Presiding Examiner's decision were filed by UGI and PSC-NY directed primarily to the findings of the Presiding Examiner with respect to the initial price (R. 252-263). UGI requested the Commission to withhold a decision until this Honorable Court reached a decision in *Atlantic Refining Company* v. *Public Service Commission of New York*[2] (R. 252). This Court rendered its *Catco* decision on June 22, 1959, and thereafter the Commission on August 10, 1959, after full consideration of this Court's *Catco* opinion, issued an order adopting with modifications the Presiding Examiner's decision granting the certificates sought by Petitioner and United. The certificates issued by the Commission

[2] The Court's decision is reported in 360 U.S. 378.

contained no price condition (R. 252-256). The initial price set forth in the contract of May 1, 1958 is 21.5 cents per Mcf at 15.025 psia with reimbursement of all tax on gas as of the date deliveries commenced amounting to 2.3 cents per Mcf at the time of hearing (R. 121-122, 127-128, 132-133, 218).

In issuing its decision of August 10, 1959, the Commission set forth in summary findings, after referring to more detailed findings in a prior opinion,[3] its "understanding of the requirements" of this Court's *Catco* decision with respect to initial prices of independent producers in certificate cases (R. 253). In this connection, the Commission stated: "Summarizing briefly, under the *Catco* case the producer's proposed initial price must be supported by substantial evidence establishing that the price is required by the public convenience and necessity and is in the public interest; and that although the Commission should consider all the factors, price is an element of prime importance which the Commission should scrutinize closely with a view of protecting the consumer" (R. 253). The Commission reviewed the guides this Court had indicated applicable with respect to the evidence that might be appropriately adduced in connection with the initial price (R. 253-254). The Commission then reviewed the evidence of record in this proceeding to determine whether the showings made by the parties justified the issuance of certificates without price condition. The Commission determined that the parties had made the requisite showing (R. 254-255). Under Section 19(b) of the Natural Gas Act the "* * * finding

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[3] In the Matter of *South Georgia Natural Gas Company, et al.*, Docket Nos. G-9892, *et al.* (Opinion No. 325), 22 F.P.C. 211, 217.

of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

After petitions for rehearing were filed by UGI and PSC-NY, and such petitions were denied by an order issued by the Commisison on October 7, 1959, UGI filed on December 1, 1959, in the United States Court of Appeals for the Fifth Circuit a petition to review the order of August 10, 1959 issuing a certificate of public convenience and necessity without price condition to Petitioner (R. 258-263, 267-284, 287-288). After oral argument, the Court on February 22, 1961 issued its decision in which it concluded and ordered that the Commission's order of August 10, 1959 should be set aside and the proceedings remanded for further appropriate action. On February 22, 1961, the Court also issued its decision and order in Cause No. 18113, regarding a certificate of public convenience and necessity also issued by the Commission on August 10, 1959. Inasmuch as the Court in its opinion in Cause No. 18113 interpreted its opinion in Cause No. 18112, review of which is hereby sought, the opinion in Cause No. 18113 is also printed in Appendix A, *infra*, pp. 32a-33a.

REASONS FOR GRANTING THE WRIT

A. The Decision of the Court Below Is Not in Accord With This Court's Catco Decision

The decision of the Court below, we respectfully submit, is not in accord with the principles enunciated by this Court's *Catco* decision. Particularly, because of intervening circumstances, as discussed in Section B hereof, it is important that this Court make its *Catco* principles definite at this time.

1. The decision of the Court below, as such decision has been interpreted by that Court in its decision in

Cause No. 18113 also issued February 22, 1961, erroneously concludes that this Court's *Cities* decision requires an independent producer to show its proposed initial price of natural gas is related to a just and reasonable price. In its decision, Cause No. 18113, the Court below stated: "As we have pointed out in the companion case No. 18112, the record makes it clear that the finding of public convenience and necessity here is based too strongly on the fact that arm's length dealing and the effect of supply and demand requires Transco[4] to agree to the disputed price, *rather than that the price had any relation to what might ultimately be found to be a just and reasonable price*"[5] (Appendix A, *infra*, pp. 32a-33a).

When the foregoing interpretation in Cause No. 18113 is considered with the statements and comments of the Court in this cause, it seems apparent that the Court below ordered the Commission's order be set aside, because of its view that Petitioner had not shown that its initial price is related to a just and reasonable price. For example, the Court below commented that in its *Bel Oil Corp.* decision it stated that a price resulting from arm's-length bargaining is not necessarily a just and reasonable price[6] (Appendix A, *infra*, p. 5a). The Court below also noted that this Court pointed out in its *Hope* case[7] that the purpose of the Act is to underwrite just and reasonable rates to the consumers of natural gas (Appendix A, *infra*, p.

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[4] "Transco" refers to Transcontinental Gas Pipe Line Co., the purchasing pipeline company in Cause No. 18113 (22 F.P.C. 369).

[5] Emphasis added unless otherwise indicated.

[6] *Bel Oil Corp.* v. *F.P.C.*, 255 F. 2d 548, 553 (1958).

[7] *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

5a). Further, the Court below refers to the differences between the level of intitial prices in certificate proceedings and price suspensions in Section 4 proceedings wherein the independent producer must show the prices to be just and reasonable (Appendix A, *infra*, pp. 5a-7a). Judge Brown in his dissent also notes that "* * * the majority treats the certification problem as though it were a rate hearing" (Appendix A, *infra*, p. 21a).

In contrast, this Court's *Catco* decision clearly points out that the determination of a just and reasonable price is not required in a certificate proceeding:

> "It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding * * *. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates" (360 U.S. at 390-391).

The United States Court of Appeals for the Ninth Circuit also holds that there is no requirement that "the Commission must determine that the proposed initial price is just and reasonable."[8]

The Court of Appeals for the District of Columbia[9] in considering the requirements of this Court's *Catco*

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[8] *The United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817, 820, cert. denied April 17, 1961 (*California Co.* v. *United Gas Improvement Co.*, ... U.S. .... [No. 776, Oct. Term, 1960], 29 Law Week 3304; *Superior Oil Co.* v. *United Gas Improvement Co.*, . . . U. S. .... [No. 780, Oct. Term, 1960], 29 Law Week 3304).

[9] *Public Service Commission of the State of New York* v. *F.P.C.*, 287 F. 2d 146, 150, cert. denied, April 17, 1961 (*Shell Oil Co.* v. *Public Service Commission of New York*, ... U.S. .... [No. 774, Oct. Term, 1960], 29 Law Week 3304; *Hope Natural Gas Co.* v. *Public Service Commission of New York*, ... U.S. .... [No. 793, Oct. Term, 1960], 29 Law Week 3304).

decision referred to a provision in Section 7(c) prior to its amendment in 1942 as did this Court in its *Catco* decision[10] that it was the intention of Congress that natural gas be sold in interstate commerce for resale for ultimate public consumption, for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest. The Court of Appeals for the District of Columbia Circuit thus does not agree with the holding of the Court of Appeals for the Fifth Circuit in this case that the initial price in a certificate proceeding must be related to the "just and reasonable" standard of Sections 4 and 5 of the Natural Gas Act in determining whether the initial price is required by the public interest.

To require a relationship between what might ultimately be found to be a just and reasonable price is clearly not in accord with this Court's *Catco* decision and the aforementioned decision of the Ninth Circuit. Moreover, the Court below has created an indefinite standard and one that cannot be applied until there is a rate case determination which this Court has stated is not necessary. It is also appropriate to point out that in a subsequent decision[11] the Court below, in affirming a Commission order issuing a certificate with price conditions, appears to have changed its view of the standard required by this Court's *Catco* decision for considering initial prices in certificate proceedings. In the decision in that case the Court stated:

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[10] 360 U.S. at 388.

[11] *Texaco, Inc., et al.* v. *F.P.C.* (CA 5, April 14, 1961), ... F. 2d .... (Nos. 18349, 18354, 18357, 18364, 18366, 18379, 18394, 18398, 18542, 18543).

> "As we have already indicated, and as all parties recognize, a section 7 proceeding is not to be equated with a proceeding under section 4 or section 5 to determine a just and reasonable rate. The power and duty of the Commission to give 'most careful scrutiny and reasonable reaction to initial price proposals of producers' may be discharged by it without the elaborate and detailed proofs required in a section 4 or a section 5 proceeding * * *" (Slip opinion, p. 17).

Clearly the action of the Court below in this proceeding was based on an erroneous interpretation of this Court's *Catco* decision, as that Court's own later decision signifies. Such action of the Court below, based on an erroneous standard, we respectfully submit, should not be permitted to stand. Unless the decision is now corrected, it will, as discussed hereinafter, result in interminable delays in determining the conditions under which independent producers may commit natural gas to the interstate market.[12]

2. The Court below erred in apparently considering non-current area prices in finding Petitioner's price had not been justified contrary to the finding of the Court of Appeals for the Ninth Circuit in another similar proceeding. Additionally, the Court apparently holds that prices finally accepted by the Commission (and not subject to further Commission or Court review) may become suspect and unusable for comparative purposes when like prices for the same area are subject to Court or Commission review.

In *Catco,* this Court set forth the following criteria for determining whether a certificate should be issued with price conditions:

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[12] See pp. 16-20.

> "* * * Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary" (360 U.S. at 391).

The record in this case demonstrates that Petitioner's sale to United would not result in the triggering of general price increases, would not result in an increase in United's existing rates and would only cause a negligible increase of 1/10th of 1 cent per Mcf in the average cost of gas to United.[13] Under such circumstances, consumers are afforded the bond of protection from excessive charges required by the Act (Cf. 360 U.S. at 388).

There appears to be a different view between the Court below and the Court of Appeals for the Ninth Circuit with regard to the prices which should be con-

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[13] The uncontradicted testimony shows that the price, including tax reimbursement, will have no substantial effect on United's weighted price of gas. Such testimony shows that the purchase will increase the average cost to United by only 1/10th of 1 cent per Mcf (R. 34). Unlike the *Cateo* case, there was definite and firm evidence that United had no "favored nation" clauses in its contracts which would be triggered by the Sun-United contract (R. 25). As the Commission had already certificated a price of 22 cents per Mcf plus tax reimbursement (In Re *Trunkline Gas Co., et al.*, 21 F.P.C. 704, which is now final), the Sun-United contract would not trigger any favored nation clauses in other pipeline contracts. The Presiding Examiner found that "There is no showing in this record that, because of the purchase of this Belle Isle Field natural gas at this initial price (21.5 cents per Mcf plus tax), there will be any increase in price to the ultimate consumer—for whose protection the Natural Gas Act was enacted. * * *" (R. 219).

sidered in determining whether the proposed initial price is "in line". While the Court below stated that it would not attempt to determine "what the 'line' is on this record", it also stated "We have no doubt that in this case the price of 23½ cents per Mcf, including tax reimbursement, * * * was out of line as the term was used by the Supreme Court" (Appendix A, *infra*, p. 10a). It appears that the Court below reached the conclusion by comparisons with average prices paid by United in 1954 of 9 cents to 12 cents per Mcf and with the Commission's action in suspending increases under escalation clauses of from 9 to 15 cents per Mcf (Appendix A, *infra*, pp. 6a-7a). As Judge Brown points out, "It [the Court below] concludes that we must go back to 1954 * * *" (Appendix A, *infra*, p. 19a).

The Court of Appeals for the Ninth Circuit set forth that "the price line is intended to reflect current conditions in the industry", and "comparative prices upon which it [the line] is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce".[14] It would appear by definition that any average of all prices paid under all contracts regardless of date of contract could not properly be compared with the narrower band of recent transactions determinative of the "line".

Petitioner believes the evidence of record as summarized below[15] supports the Commission's finding that

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[14] *The United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817, 824, cert. denied April 17, 1961.

[15] As early as about 1954 certificates were issued for the Gulf Interstate and American Louisiana pipelines and the price for gas paid by these pipelines was 20 cents per Mcf (R. 32). The Commission found that much South Louisiana gas is today being sold at 21.5 cents per Mcf plus tax reimbursement (R. 254). There was

Petitioner's base price is in line, and the slightly higher tax reimbursement which the Court below apparently considered as a part of the overall price, is in the public interest when all the factors of record listed in the next section are evaluated (Appendix A, *infra*, p. 10a, fn. 1). Petitioner respectfully submits that price comparisons reflecting "current conditions" are proper rather than comparisons based upon past conditions apparently used by the Court below in holding the price to be "out of line."

In finding that Petitioner's price was out of line, the Court appears to hold that when a substantial number of certificated prices are under Court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect, and should not be relied on in fixing a "line" (Appendix A, *infra*, p. 9a). In essence, this holding requires that only Court-approved prices can be considered in determining the price line when comparable prices are under attack in the same area without any regard to the evidence of record as to the "going" price.

An initial price finally determined by the Commission in a certificate proceeding under Section 7 of the

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uncontradicted evidence in the record that two pipeline companies in the area were paying the base price of 21.5 cents per Mcf (R. 28). The Commission reports show that in its *Southern Natural Gas Co.* decision of April 18, 1958, 19 F.P.C. 558, a price of 22.8 cents per Mcf was approved, and in the *Trunkline Gas Co.* decision of May 22, 1959, 21 F.P.C. 704, a base price of 22 cents plus tax reimbursement was approved. The orders issuing the certificates without price conditions in the *Southern Natural* and the *Trunkline* cases were final, although there was a review of the *Trunkline* case (*Public Service Commission* v. *F.P.C.*, ... F. 2d .... (CADC, No. 15365, decided April 28, 1960)).

Act to be in the public interest remains valid and effective regardless of the action of the Commission on any other initial price proposals in any other Section 7 proceedings and regardless of whether the actions in the later proceedings are reviewed by the Courts. To exclude any finally Commission-accepted prices from the Commission's consideration of initial prices in a certificate case would prevent the Commission from considering current conditions. Moreover, such exclusion would limit the Commission's function "* * * to appraise the facts * * *", bearing upon the public convenience and necessity and to bring to bear upon the problem its expert judgment (Cf. *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241). The holding of the Court below would accord to interested parties in certificate cases the right retroactively to destroy or hold in abeyance the validity of Commission-accepted prices in prior certificate cases by seeking review of a price accepted by the Commission in a later and unrelated proceeding. The review provisions of Section 19(b) of the Act clearly do not intend that an initial price finally accepted by the Commission shall be rendered invalid by review for any purpose, except by observing the requirements of that section of the Natural Gas Act.

3. The Court below re-evaluated only a part of the evidence of record before the Commission and on this erroneous basis concluded there was no evidence to justify the price it found to be out of line.

Unlike this Court's *Catco* decision wherein the Court stated that there was no support in the record for the finding of need (360 U.S. at 393), there was extensive testimony in this proceeding concerning the need for the gas on the United system (R. 18-24). As Judge

Brown pointed out in his dissent, referring particularly to the factor of need, "This is no CATCO record" (Appendix A, *infra*, p. 25a). No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished. *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 239 F. 2d 97, 101 (CA 10-1956). The Court below in this proceeding stated in its opinion that "United shows it has need of, and a demand for, this Belle Isle gas to meet the present and future requirements of its customers" (Appendix A, *infra*, p. 4a). Yet the Court, unlike the Commission, apparently did not consider the fulfillment of such need—one of the Commission's most important functions—in finding that the sale without price condition is not required by the public convenience and necessity.

We set forth below[16] certain other evidence of record in this proceeding which, in addition to that listed above and in footnotes 13 and 15 *ante*, pp. 11, 12-13, was available to the Commission to evaluate in determining whether a certificate should be issued without price condition.

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[16] The gas reserves were substantial (R. 18, 27, 42); the facilities to be built by United were low in cost (R. 17) by reason of the favorable location of the gas to United's pipeline facilities (R. 12, 17, 28); the great depth of gas wells (R. 45) and the extensive development of the field over a long period of time (R. 44-46) permitted prompt delivery of contract quantity (R. 46) and large swing on daily takes of 150% (R. 43) with the convenience of a sole seller-operator to be dealt with in the whole field (R. 72). The arm's-length negotiations between unaffiliated buyers and sellers (R. 18-19, 27-30, 41-42) resulted in a price equivalent to prices being paid to others by United and other buyers (R. 24, 28, 35-36, 55-58) which was the "going price" in the South Louisiana area for the volume of gas involved in this sale (R. 57-58).

Under this Court's *Catco* decision it is the duty of the Commission to evaluate *all* the factors bearing on the public interest (360 U.S. at 391). Thus, it is respectfully submitted that the Court below erred in holding that the only evidence of record to support the price was arm's-length bargaining and competition (Appendix A, *infra,* p. 10a) and in not finding that the Commission's evaluation of all the evidence supported the issuance of the certificate without price condition.

It further appears that the Court below may have particularly considered that competition for the gas is not a factor to justify the initial price, as the Court makes, we believe, the erroneous finding that "* * * the only justification for giving the Commission the duty to regulate prices was the determination by Congress that the producers have a supply that is so restricted in relation to demand that they have the economic power to bargain for prices that will be injurious to the public" (Appendix A, *infra,* p. 5a). As far as Petitioner has been able to determine, there is no support for this conclusion in the legislative history of the Natural Gas Act.

B. This Appeal Involves Important Legal and Other Considerations

The questions presented in this petition are important to the administration of the Natural Gas Act and in providing at stable prices future sources of natural gas for ultimate public consumption. The prices which an independent producer may expect to receive for his gas as well as the expense and time required to obtain a regular certificate are material factors involved in committing new supplies of natural

gas to the interstate market. If past average prices paid by the purchasing pipeline are to be a measure of the initial price "line" for new sales as the Court below seems to hold, unless the price is related to just and reasonable prices as the Court below does hold, then these requirements of regulation must be taken into consideration by the independent producers in contracting for the sale of gas.

This Court in its *Cities Service* decision alluded to the delay incident to determining just and reasonable rates in a § 5 proceeding as that which "appears nigh interminable" (350 U.S. at 389). Since the *Cities Service* decision, the Commission on September 28, 1960 issued its decision in the *Phillips* rate case[17] in which, among other things, the Commission concluded: "Experience of the Commission in this case, as well as in many other producer rate cases during the last five years, has shown, beyond any doubt, that the traditional original cost, prudent investment rate base method of regulating utilities is not a sensible, or even a workable method of fixing the rates of independent producers of natural gas" (24 F.P.C. at 542). In this decision the Commission also stated: "From the foregoing, it follows that effective regulation of the price of natural gas must be on some more manageable plan than the rate base method" (24 F.P.C. 547). Simultaneously with the issuance of such opinion the Commission promulgated a General Policy Statement fixing area prices which will be accepted by the Commission as initial prices and as changes in rates without hearing or suspension. This General Policy Statement was called to the attention of the Court below (Appendix A,

[17] *Phillips Petroleum Company*, Docket Nos. G-1148, *et al.* (Opinion No. 338), 24 F.P.C. 537.

infra, pp. 10a-11a). Such order was subsequently amended on October 25, 1960, to include the Southern Louisiana area.[18] The prices therein adopted were not made applicable to the sale involved in this proceeding because of the pendency of this matter before the Court below. The basic price under the General Policy Statement for the Southern Louisiana area is 21.5 cents per Mcf at 15.025 psia, the initial basic price authorized in the Commission order of August 10, 1959, plus tax reimbursement, the price the Court below held had not as yet been justified. The ultimate objective of the schedule of prices included in such General Policy Statement is "to set prices in all producing areas which will be adequate to maintain the gas supplies needed by the consumers of the nation, but at prices that are no higher than are necessary to accomplish that purpose."[19]

On May 10, 1961 the Commission issued an order instituting an area rate proceeding for the Southern Louisiana area.[20] Such order was directed to more than 200 independent producers. Consolidated as a part of the proceeding were some 360 certificate application dockets and some 330 Sections 4 and 5 rate dockets.[21] In such order the Commission noted the initiation of its first area rate investigation for the Permian Basin area instituted by the Commission order

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[18] See Statement of General Policy No. 61-1, issued September 28, 1960, 24 F.P.C. 818; First Amendment to Statement of General Policy No. 61-1, issued October 25, 1960, 24 F.P.C. .....

[19] *Phillips Petroleum Company*, Docket Nos. G-1148, *et al.*, 24 F.P.C. 537, 547.

[20] *Area Rate Proceeding*, Docket Nos. AR61-2, *et al.*

[21] Includes 29 certificate dockets consolidated by an order issued May 19, 1961, in Docket Nos. AR61-2, *et al.*

of December 23, 1960. Such investigation is still in the prehearing conference stage. In such order of May 10, 1961, the Commission stated that "* * * because of the importance of the Southern Louisiana area as a source of present and future gas supply, and because of the unusually large number of pending proceedings relating to that area, we have decided to initiate a hearing to determine the initial producer area rate or rates required by the public convenience and necessity and the just and reasonable area rate, or rates, for or within the geographical area hereinafter described."

As we have pointed out herein the Court below erroneously holds that the initial price must be related to just and reasonable prices. The Commission, in the *Phillips* rate case, found that the cost of service method for determining just and reasonable rates is not a workable or sensible method for fixing just and reasonable prices for independent producers. Under the criterion of the Court below, Petitioner to justify its initial price is required to make a showing, which the Commission now says is neither workable nor sensible by ordinary methods. That Court, as we have noted, apparently would require that the price line be predicated on past prices. Moreover, the Commission, as already noted, has recently undertaken to determine the initial producer area rate or rates required by the public convenience and necessity and the just and reasonable area prices by a new concept of area prices in a very complex proceeding involving some six hundred and ninety dockets and more than two hundred independent producers. Under the present status of producer regulation it seems that the guides of *Cato* need to be made as definite and certain as possible; otherwise, it appears that further interminable delays

will occur in determining the conditions under which independent producers will be permitted to commit their gas to the interstate market. In this connection Judge Brown appropriately points out:

> "I look at this as though I were sitting in the Commission's seat. Faced with our order of remand 'for further appropriate action,' what action should be taken? Hold a hearing to develop what is already known? Hold a hearing to determine that the inevitable is really so, and that producers are free to offer or not offer gas for sale at the current market price? Or is this intended merely as an invitation to impose automatically some kind of price condition? If so, where will it be fixed? * * * Finally, the Commission can well ask, how are we ever to catch up with the staggering load of § 4 and § 5 proceedings if to that burden we must now add two others—a full dress rehearsal hearing for every certification or the equivalent of a § 4 suspension proceeding through the guise of a price condition? * * *
>
> "I am confident of only one thing: this case will be back several years and thousands of pages later. No one will know more than is known now" (Appendix A, *infra,* pp. 28a-29a).

CONCLUSION

The decision and judgment of the Court below ordering that the Commission's order issued August 10, 1959, be set aside, we respectfully submit, should be reviewed by this Court, because they are not in accord with this Court's *Catco* decision in the respects set forth herein; and, upon review, should be set aside and the Commission's order affirmed.

Accordingly, pursuant to Section 19(b) of the Natural Gas Act and Paragraph 1(b) of Rule 19 of the

Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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